October 23, 1990

MEMORANDUM

TO: The Honorable Bartholomew A. Kane
State Librarian

ATTN: John R. Penebacker
Special Assistant to the State Librarian

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Access to Library Patron Circulation and Fine Records

This is in reply to a letter dated October 3, 1990, from John R. Penebacker requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the above-referenced matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), patron circulation records maintained by the Hawaii State Public Library System ("Library"), which identify materials used, requested, or obtained by a patron, must be made available for public inspection and copying?

II. Whether, under the UIPA, information maintained by the Library concerning fines assessed to or owed by Library patrons must be made available for public inspection and copying?

BRIEF ANSWERS

I. Unlike the majority of states, Hawaii does not have a specific statute which prohibits public access to public library circulation records. Accordingly, resolution of the question presented must be determined with reference to the provisions of the UIPA.

The UIPA does not require agencies to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1989). In order for this exception to apply to a particular government record, it must be a record in which an individual has a significant privacy interest. Based upon attorney general opinions from several other states, and a decision of the Supreme Court of Hawaii, we conclude that individuals have a significant privacy interest in information, such as Library circulation records, which reveals their thoughts, associations, or beliefs.

Furthermore, under the UIPA's balancing test set forth at section 92F-14(a), Hawaii Revised Statutes, we conclude that an individual's privacy interest in Library circulation records is not outweighed by the public interest in disclosure. The public disclosure of Library circulation records would reveal little about "the discussions, deliberations, decisions, and action of government agencies." See Haw. Rev. Stat. § 92F-2 (Supp. 1989). Indeed, the public disclosure of Library circulation records would reveal little more than the fact that the Library permitted materials to be borrowed. Accordingly, we conclude that generally, the public disclosure of Library circulation records would "constitute a clearly unwarranted invasion of personal privacy" under the UIPA.

II. Although individuals may have a significant privacy interest in the fact that they have been assessed or owe library fines, we conclude that the disclosure of amounts assessed to, or owed by, Library patrons would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. In our opinion, under the UIPA there is a significant public interest in the disclosure of information concerning amounts owed by individuals to government agencies. The disclosure of this information would reveal any favoritism in the assessment and collection of library fines, whether certain patrons are permitted to exceed maximums set by the Library, and whether the Library diligently collects said fines. Therefore, under the UIPA's balancing test, we conclude that the public interest in the disclosure of this information outweighs the privacy interest an individual may have in the same.

FACTS

The Library maintains a variety of information concerning its users ("patrons") in a computer database. Information that is maintained by the Library regarding its patrons may generally be divided into three categories.

First, the Library maintains "registration data" which consists of the Library patron's name, patron identification number, address, telephone number, place of registration, and registration date. If the patron is a minor, registration information includes the child's name, grade, school, and guardian.

Second, the Library maintains information concerning "items on loan or request." This information identifies items currently on loan, the status of item (overdue), the date item is due, items on request, and the date placed.

Lastly, the Library maintains information concerning fines owed by its patrons, the items on which fines are due, and whether a patron has exceeded fine maximums established by the Library.

The Library requests the OIP to advise it whether the above-stated information it maintains concerning its patrons must be made available for public inspection under the UIPA.

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Thus, the UIPA provides, "[e]xcept as provided by section 92F-13, each agency upon request by any person shall make government records available for inspection and copying." Haw. Rev. Stat. § 92F-11(b) (Supp. 1989). "Government record" under the UIPA "means information maintained by an agency in written, auditory, visual, electronic or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989) (emphases added). Because the Library is a "unit of government in this State" or "governing authority," it is an "agency" subject to the provisions of the UIPA. See Haw. Rev. Stat. § 92F-3 (Supp. 1989).

Thus, unless protected by one of the UIPA's statutory exceptions to required agency disclosure, the Library's patron records must be made available for inspection and copying during regular business hours. In examining the exceptions set forth at section 92F-13, Hawaii Revised Statutes, the only exception that potentially applies to information concerning patrons of the Library is the UIPA's personal privacy exception. We now turn to an examination of this exception.

II. UIPA'S PERSONAL PRIVACY EXCEPTION

Section 92F-13(1), Hawaii Revised Statutes, provides:

> "§92F-13 **Government records; exceptions to general rule.** This chapter shall not require disclosure of:
> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; . . . ."

Haw. Rev. Stat. § 92F-13(1) (Supp. 1989).

Under the UIPA, only "natural persons" have cognizable personal privacy interests. See Haw. Rev. Stat. § 92F-3 (Supp. 1989) ("individual means natural person"). Additionally, under the UIPA, an individual must have a "significant" privacy interest in a government record before the UIPA's privacy exception will apply to that record. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S. J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced"). Therefore, as an initial matter, it must be determined whether Library patrons have a significant privacy interest in the government records under consideration herein.

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which an individual has a significant privacy interest. Section 92F-14(b), Hawaii Revised Statutes, is silent as to the registration or circulation records of public libraries. However, Senate Standing Committee Report No. 2580, dated March 31, 1988, and the commentary to parallel provisions of the Uniform Information Practices Code, upon which the UIPA is based, indicate that this "enumeration is not intended to be exhaustive."[1]

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[1]The Legislature directed those interpreting the UIPA's provisions to consult the Commentary to the Uniform Information Practices Code for guidance in applying similar provisions of the UIPA. See H.R. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988).

The privacy interest that public library patrons have in library circulation records has been the subject of widespread interest, legislation, and legal commentary.[2] As observed by one commentator:

> For centuries, librarians have been asked to reveal who reads what. Libraries have been asked for reading histories of specific users, circulation histories of particular books, and research histories of controversial topics. Biographers have pored over the library records of Presidents John Adams and Abraham Lincoln . . . . Police have asked who borrows books on photoengraving, bomb making, and the occult.

Kennedy, Confidentiality of Library Records: A Survey of Problems, Policies, and Laws, 81 Law Libr. J. 733 (1989) (hereinafter "Kennedy").

According to our research, as of the date of this opinion, over forty states have enacted statutes that restrict, in varying degrees, public access to patron records of public libraries. See generally Kennedy, 81 Law Libr. J. 733 (1989); Johnson, A More Cooperative Clerk: The Confidentiality of Library Records, 81 Law Libr. J. 769 (1989). The State of Hawaii, on the other hand, does not have a specific library records privacy statute which restricts the disclosure of library patron records. Generally, those states that have enacted library patron confidentiality statutes establish a routine right of privacy in library records that may be suspended for good cause as determined by a court or some similarly neutral arbiter.

These statutes differ widely in defining the types of patron records which are protected from disclosure. One approach defines the class of library records which are protected from the perspective of the library. These statutes shield "circulation records" or "registration records." A

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[2] See generally Comment, Surveillance of Individual Reading Habits: Constitutional Limitations on Disclosure of Library Borrower Lists, 30 Am. U.L. Rev. 275 (1981); O'Neil, Libraries, Liberties and the First Amendment, 42 U. Cinc. L. Rev. 209 (1973).

second, and more common legislative approach, identifies the relevant class of records in terms of patron activity. Many statutes protect records that reflect library materials "requested," "obtained," or "used" by a patron. Arkansas, for example, has a comprehensive law that protects information or documents generated in circulation transactions, computer database searches, interlibrary loans, reference queries, patent searches, and photocopy requests, as well as requests to use reserve and audiovisual materials. A third legislative approach defines the relevant class of protected records in terms of records which reveal a patron's identity or research interest.[3]

In addition to statutes enacted by the majority of states, the American Library Association has adopted a Policy on Confidentiality of Library Records. The current version of this policy strongly recommends that the responsible officers of each library formally adopt a policy which specifically recognizes as confidential, its circulation records and other records identifying the names of library users with specific materials. See ALA Policy Manual . 52.4, in American Library Association, ALA Handbook of Organization 1988/89, at 37 (1988).

No judicial decision in this State, nor in other jurisdictions, has held that individuals have a constitutional right to privacy in library circulation records. However, in Brown v. Johnston, 328 N.W.2d 510 (Iowa 1983) the Iowa Supreme Court permitted the state to obtain library circulation records despite claims that library patrons had a right to privacy in those records. In Brown, the court did not explicitly find that patrons' privacy rights were infringed. Instead, the court merely held that if a library patron's right to privacy existed, it was outweighed by the state's interest in a criminal investigation. See Brown 328 N.W.2d 512-13. The decision of the Brown court has been strongly criticized by some commentators. See Comment, Brown v. Johnston: The Unexamined Issue of Privacy in Public Library Circulation Records in Iowa, 69 Iowa Law. Rev. 535 (1983).

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[3]For a thorough discussion of the diverse scope of these state statutes, see Kennedy, 81 Law Libr. J. 733, 754-766 (1989).

The facts in Brown are distinguishable from those present here, since in the Brown case, the state sought the circulation records pursuant to a subpoena under the rules of criminal procedure. In this opinion, we must decide whether library circulation records must be available for public inspection under an open records statute. Because Brown involved a subpoena issued under the state's rules of criminal procedure, pursuant to which the state sought access to library circulation records, it is of marginal value in determining whether the public should be permitted access to library circulation records.

The constitutional uncertainty that appears in the Brown decision is reflected in several opinions issued by the attorneys general of various states. The attorneys general of Nevada, Tennessee, and Texas have opined that the United States Constitution protects the confidentiality of library circulation records. See Op. Att'y. Gen. Nev. 80-6 (1980); Op. Att'y Gen. Tenn. 87-04 (1987); Att'y. Gen. Tex. Open Records Decision No. 100 (July 10, 1975). The attorneys general for two other states, Iowa and Mississippi, have taken the opposite view. See Op. Att'y. Gen. Iowa No. 71-8-22 (1971); Op. Att'y. Gen. Iowa No. 78-8-25 (1979); Op. Att'y. Gen. Miss. (May 10, 1985) (available on WESTLAW, MS-AG Database).

In Texas, the Attorney General concluded that library circulation records could not be inspected by the public under an exemption to the Texas Open Records Law, which applied to "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Acknowledging that the question was one of first impression, the Texas Attorney General stated:

> [W]e believe that the courts, if squarely faced with the issue, would hold that the First Amendment of the United States Constitution . . . makes confidential that information in library circulation records which would disclose the identity of library patrons in connection with with the material they have obtained from the library.
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> The First Amendment "necessarily protects the right to receive" information, Martin v. City of Struthers, 318 U.S. 141, 143 (1943). It protects the anonymity of the author, Talley v. California, 362 U.S. 60 (1960); the anonymity of members of organizations, Gibson v. Florida Legislative

> Investigation Committee, 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); the right to ask persons to join a labor organization without registering to do so, Thomas v. Collins, 323 U.S. 516 (1945), the right to dispense and to receive birth control information in private, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to have controversial mail delivered without written request, Lamont v. Postmaster General, 381 U.S. 301 (1965); the right to go to a meeting without being questioned as to whether you attended or what you said, DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966), the right to give a lecture without being compelled to tell the government what you said, Sweenzy v. New Hampshire, 354 U.S. 234 (1957), and the right to view a pornographic film in the privacy of your own home without governmental intrusion, Stanley v. Georgia, 394 U.S. 557 (1969).
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> . . . .
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> If by virtue of the First and Fourteenth Amendment, "a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch," Stanley v. Georgia, supra at 565, then neither does the state have any business telling a man's neighbor what book or picture he has checked out of the public library to read or view in the privacy of his own home.

Texas Open Records Decision No. 100 at 2-3 (Jul. 10, 1975).

In some jurisdictions, the protection of library patron records is established as an exemption to the state's open records law. See Ind. Code Ann. . 5-14-3-3(b)(16) (1985); Or. Rev. Stat. . 192.500(1)(j) (1985); Va. Code Ann. . 2.1-342(B)(8) (1985). On the other hand, the state of Kentucky does not have a library records privacy statute, nor does its open records law specifically exempt such information from disclosure. However, the Kentucky Attorney General has opined that the disclosure of library records which show the use of library materials by named persons would constitute an "unreasonable invasion of privacy." In Op. Att'y. Gen. Ky. No. 82-149 (March 12, 1982), the Kentucky Attorney General found that "the individual's privacy right as to what he borrows from a public library (books, motion picture film, periodicals and any other matter) is overwhelming." Id. at 1.

Similarly, before the amendment of Oregon's open records statute to expressly exempt library patron records from disclosure, the Oregon Attorney General stated:

> In our society, the private thoughts of individuals comprise the most sacred bastions of privacy. The development of these thoughts is commonly nourished by reading. These private thoughts frequently develop as reflections of, or reactions to the literature an individual selects. The knowledge that the disclosure of library circulation records showing the use of specific library materials by named persons may occur, may intimidate individuals in the selection of library materials. Such disclosure could permit inferences to be drawn as to the private thoughts of individuals. We therefore conclude that the disclosure of such circulation records would clearly constitute an unreasonable invasion of privacy . . . .

41 Op. Att'y. Gen. Or. 435 (1981) (emphasis added).

In enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1989). On the other hand, the Legislature recognized that "[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii." Haw. Rev. Stat. § 92F-2 (Supp. 1989). Consistent with these principles, the Legislature directed those applying the UIPA to "[b]alance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-2 (Supp. 1989).

In our opinion, individuals have a significant privacy interest in information that reveals the materials that they have requested, used, or obtained from a public library. In addition to forgoing authorities, in State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985), the Hawaii Supreme Court noted that article I, section 7 of the Constitution of the State of Hawaii was intended to protect individuals from unwarranted governmental intrusion in activities or matters which reveal an

individual's "activities, associations and beliefs," such as an individual's choice of reading materials. See Tanaka 67 Haw. at 662. We also concur with the Oregon Attorney General, when he observed that the disclosure of library circulation records would permit inferences to be drawn as to the private thoughts of individuals.

This conclusion does not end our analysis, since the UIPA provides that the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1989). In previous OIP advisory opinions, we opined that the "public interest" to be considered under the UIPA's balancing test is the public interest in information concerning the discussions, deliberations, decisions, and actions of government agencies, which sheds light upon an agency's performance of its statutory duties, or upon what the "government is up to." See OIP Op. Ltr. Nos. 89-16 at 4-6 (Dec. 27, 1989); 90-1 at 8 (Jan. 8, 1990); 90-7 at 7 (Feb. 9, 1990).

In balancing the individual's privacy interest in library circulation records against the "public interest" in disclosure, we agree with the point of view expressed by the General Counsel of the American Library Association:

> Library circulation records do **not** contain information regarding the affairs of government but contain information only about the reading habits and propensities of individual citizens. Moreover, library circulation records clearly do not reflect the official acts of public officials and employees.
>
> It is no secret that libraries keep circulation records to keep track of their collection . . . . The only acts revealed in such records are the acts of private citizens in borrowing books; the only "official act" they reflect is the fact that the library permitted the book to be borrowed.

Statement of William D. Hill to John Hill, Attorney General of Texas (May 6, 1975), quoted in Million & Fisher, Library Records: A Review of Confidentiality Laws and Policies, 11 J. Academic Librarianship 346, 347 (1986).

We conclude that under the UIPA's balancing test, the public interest in the disclosure of library records reflecting materials requested, used, or obtained by a Library patron, does not outweigh a Library patron's significant privacy interest in such information. Accordingly, we conclude that the public disclosure of this information would, under most circumstances, result in a clearly unwarranted invasion of personal privacy.[4]

Furthermore, in previous OIP advisory opinions, we concluded that generally, the disclosure of an individual's home address and home telephone number would result in a clearly unwarranted invasion of personal privacy. See OIP Op. Ltr. No. 90-16 (Dec. 27, 1989). Thus, under the UIPA, the Library should not disclose this patron information to the public.

With respect to Library government records which identify fines owed by patrons for overdue library materials, the UIPA does evidence a significant public interest in the disclosure of information concerning amounts owed by individuals to government agencies. See Haw. Rev. Stat. . 92F-12(a)(8) (Supp. 1989); OIP Op. Ltr. No. 90-29 (Oct. 5, 1990). Similarly, other State and county laws reflect this significant public interest. See Haw. Rev. . 231-3(10) (Supp. 1990) (State compromises of tax liabilities open to public inspection); Rev. Ord. Hon. .. 8.1.11 and 8.1.17 (1983) (real property tax assessments and delinquencies open to inspection). Indeed, the Texas Attorney General, while concluding that individuals have a constitutional privacy interest in library circulation records, also stated that:

> [W]e do not believe that this constitutional protection extends beyond the identification of an

[4]We note under circumstances not present in the facts before us, the public disclosure of Library circulation records would be required by the UIPA. For example, under the UIPA, agencies must disclose government records pursuant to a showing of compelling circumstances affecting the health or safety of any individual, or pursuant to court order. See Haw. Rev. Stat. . 92F-12(a)(2),(3)(Supp. 1989).

> individual patron with the object of his or her attention. Thus, we do not believe that the fact that a person has used the library, owes or has paid a fine is confidential information.

Att'y. Gen. Tex. Open Records Decision No. 100 at 3.

Unlike the disclosure of patron circulation records, the disclosure of amounts owed by library patrons for overdue materials would open up agency actions to the light of public scrutiny. Specifically, the disclosure of such information would indicate whether Library personnel diligently collect unpaid fines, show favoritism in the assessment or collection of such penalties, or allow patrons to exceed fine maximums set by the Library. As such, disclosure of patron fine information would significantly further one of the UIPA's central policies, that the "decisions, and actions of government agencies . . . shall be conducted as openly as possible." Haw. Rev. Stat. . 92F-3 (Supp. 1989).

We conclude that given the public interest in the disclosure of amounts owed by individuals to government agencies, the disclosure of government records reflecting amounts owed by Library patrons would not be "clearly unwarranted" under the UIPA's personal privacy exception. Of course, for the reasons stated above, the Library should not disclose information which would identify the library materials which are associated with a patron's library fines.

Lastly, by this opinion, we merely conclude that the UIPA generally does does not require State and county libraries to make available their circulation records for public inspection. We express no opinion concerning the inter-agency disclosure of such information under section 92F-19, Hawaii Revised Statutes, or pursuant to a subpoena issued in the course of a criminal investigation.

CONCLUSION

We conclude that generally, the disclosure of information which reveals library materials requested, used, or obtained by individuals would result in a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. In our opinion, individuals have a significant privacy interest in information concerning materials that they have requested, used, or obtained from the Library. Further,

under the UIPA's balancing test, we find that an individual's privacy interest in this information is not outweighed by the public interest in disclosure.

We further conclude that although individuals may have a significant privacy interest in information concerning fines assessed against them by the Library, the public interest in the disclosure of this information outweighs the privacy interests of the individual. Accordingly, we conclude that the disclosure of information regarding library fines that have been assessed or collected from individuals would not result in a clearly unwarranted invasion of personal privacy under the UIPA.

Hugh R. Jones
Staff Attorney

HRJ:sc

APPROVED:

Kathleen A. Callaghan
Director